

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TONY B. GASKINS

CIVIL ACTION NO. 05-CV-10858-GAO

Plaintiff,

vs.

UMASS CORRECTIONAL
HEALTH SERVICES, ET AL.

Defendants.

MOTION TO STRIKE PLAINTIFF'S NOTICE OF APPEAL AS UNTIMELY

Defendants Susan Martin, Lisa Mitchell and David Nolan, through counsel, hereby move to strike plaintiff's "Late Notice of Appeal," filed with this Court on October 22, 2007, as untimely. As grounds therefore, the aforesaid defendants state as follows.

1. On July 31, 2006, Magistrate Judge Bowler entered a Report and Recommendation in which she recommended that defendants' Motion for Summary Judgment be allowed. See docket entry 45.
2. On August 15, 2006, plaintiff filed a Motion for Leave to Appeal "the Report and Recommendations of U.S.M.J. Bowler on July 31, 2006." See docket entry 48. This Motion was never acted upon.
3. On September 26, 2006, Judge O'Toole entered an "Order Adopting Report and Recommendations" and entered judgment in favor of the defendants against plaintiff. See docket entries 51 and 52.
4. On October 23, 2006, plaintiff filed a Motion for Leave to Appeal in Forma Pauperis "the Report and Recommendation of U.S.M.J.

Bowler on July 31, 2006.” See docket entry 53 (emphasis added.)

With the exception of the handwritten dates, this document is identical to docket number 48, filed on August 15, 2006.

5. On November 30, 2006, this Court allowed the plaintiff’s Motion for Leave to Appeal in forma pauperis dated October 23, 3006. See docket entry dated November 30, 3006.
6. Plaintiff has never filed a Motion for Leave to Appeal in Forma Pauperis with respect to the judgment entered in favor of defendants by Judge O’Toole on September 28, 2006.
7. Plaintiff did not file his “Late Notice of Appeal” until October 22, 2007, **more than one year** after judgment entered in favor of defendants. See docket entry 54.
8. It is unclear what action by the Court plaintiff’s “Late Notice of Appeal” refers to. Regardless of what plaintiff intends to appeal, however, his October 2007 “Late Notice of Appeal” is untimely and should be stricken by this Court.
9. Federal Rules of Appellate Procedure 4(a)(1)(A) states that “in a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.”¹

¹ Plaintiff is no stranger to litigation in state and federal court. As set forth in Exhibit 1, he has filed at least 17 lawsuits against Department of Correction officials since 2003.

10. Plaintiff's Notice of Appeal was filed more than 30 days after judgment was entered in favor of defendants on September 28, 2006.
11. Prisoners appearing pro se must adhere to the rules of procedure. "The right of self-representation is not 'a license not to comply with the relevant rules of procedural and substantive law.'" International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 847 (1983), quoting Faretta v. California, 422 U.S. 806, 834-835 n.46 (1975).

Wherefore, defendants Martin, Mitchell and Nolan request that this Court strike plaintiff's Late Notice of Appeal.

Dated: October 31, 2007

Respectfully submitted,

NANCY ANKERS WHITE
Special Assistant Attorney General

/s/ Jody A. Brenner

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CERTIFICATE OF SERVICE

I hereby certify that on this date a true copy of the above document was served on plaintiff, pro se, via first class mail.

Dated: 10/31/2007

/s/ Jody A. Brenner

Jody A. Brenner, Counsel

